Filed 12/27/04 P. v. Borunda CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. DANIEL W. BORUNDA, Defendant and Appellant.	B171024 (Los Angeles County Super. Ct. No. NA 048633)

APPEAL from a judgment of the Superior Court of Los Angeles County. Joan Comparet-Cassani, Judge. Affirmed.

David D. Carico, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Susan D. Martynec and Robert S. Henry, Deputy Attorneys General, for Plaintiff and Respondent.

Daniel Borunda appeals from the judgment entered after a jury convicted him of second-degree murder. (Pen. Code, §§ 187, subd. (a), 189; all further undesignated section references are to the Penal Code.) In a bifurcated trial after a jury waiver, the trial court found Borunda had four strike and serious prior felony convictions: 1978, 1984, and 1990 residential burglaries, and a 1981 arson. (§§ 667, subds. (a)-(i), 1170.12; 459, 460; 451.) Borunda received an aggregate 60-years-to-life sentence: 15-years-to-life, tripled to 45-years-to-life under the Three Strikes law, and a consecutive 15-year term for three of the prior serious felony convictions.

Borunda contends (I) insufficient evidence supports the murder conviction; (II) the trial court erred in excluding third-party culpability evidence; and (III) his trial counsel was incompetent in not making a sufficient offer of proof regarding the third-party culpability evidence.

We reject Borunda's contentions and affirm the judgment.

FACTS

On November 4, 1999, the murder victim, 90-year-old Dorothy Bembridge, was found in the backyard of her home. Bembridge was killed by manual strangulation. Bembridge lived alone in a home which abutted Drake Park in Long Beach; a six-feet-tall chain-link fence separated Bembridge's backyard from the park. The only trial issue was the killer's identity. No forensic evidence implicated Borunda, who denied killing Bembridge in his post-arrest police interrogation. Borunda incurred his 1990 residential burglary conviction for burglarizing Bembridge's home. Prior to the burglary, Bembridge had hired him on several occasions to do odd jobs and eventually testified against Borunda, who received a 19-year sentence. On October 17, 1999, Borunda was paroled to a halfway house a few blocks from Bembridge's home. The prosecution sought a first-degree murder conviction, theorizing that Borunda murdered Bembridge for her role in the 1990 conviction, and planned to return later and burglarize the now-empty house.

Friends summoned police to Bembridge's home shortly before noon on November 4 because she was not home, and it was unusual for her to be out alone. The front door was locked, but one of the rear doors was open. The screen on the open rear door was closed but unlocked. There was no sign of forced entry, any struggle, or ransacking inside the house. Nothing inside appeared to be missing or disturbed. The porch lights were on, although it was midday. After an initial search of the house and backyard disclosed nothing, a friend found Bembridge's body in the middle of the backyard surrounded by high underbrush. None of the brush between the edge of the yard and Bembridge's body was trampled or disturbed, suggesting that her killer threw her body into the brush to conceal it.

Bembridge's body was found face down, clothed in a sweater pulled up to her neck and underwear in its normal position. A pair of stretch pants was tied in a knot around her legs, tying them together. Her head was near a plastic trash bag. A ring was on one finger and a necklace was in place. Facial bruising and hand scratches suggested she had been punched in the face with a fist and had tried to defend herself with her hands. An autopsy disclosed that Bembridge died 18-24 hours before her body was discovered, or between noon and 6 p.m. on November 3.

Bembridge's regular mail carrier spoke with her around 4 p.m. on November 3 at her home. Everything was normal.

Roxanna Mercado worked as a volunteer at Drake Park for several years, and knew people who frequented the park. For a few weeks before the murder, Mercado saw Borunda in the park, usually at a table near Bembridge's fence. Several days before Bembridge's death, Mercado saw Borunda lying on a park bench, apparently intoxicated. When Mercado told him not to sleep on the tables, Borunda replied it was a free country and he could lay where he wanted. Mercado saw Borunda in the park on November 3, the day Bembridge was murdered.

On November 18, Mercado saw Borunda climb over Bembridge's fence from Bembridge's backyard into the park and sit at a nearby table. Borunda was carrying a

paper bag, but Mercado could not see what, if anything, was inside the bag. A Black man and a Hispanic man wearing gloves approached and spoke with Borunda, who motioned toward Bembridge's house. Mercado called the police. The two men started to walk away as the police approached. The police contacted Borunda and the two men, whose names were Michael Johnson and Michael Vasquez.

Police arrested Borunda on November 18. In a paper bag in Borunda's jacket pocket, police found a unique, well-preserved Scottish kilt pin that two of Bembridge's friends recognized as one Bembridge, who had taken pride in her Scottish heritage, owned and wore. An expert on such jewelry opined that the pin's materials, workmanship, and date of creation showed it was produced by a Scottish craftsman in 1952, was individually made rather than being mass-produced, had been well-cared for, and probably would not have been sold commercially in the United States. The kilt pin was the only item taken from Bembridge's home.

Police interrogated Borunda for several hours that afternoon. Initially, police told Borunda he was being interviewed about trespassing in Bembridge's yard. After being advised of and waiving his *Miranda* rights (*Miranda v. Arizona* (1966) 384 U.S. 436), Borunda said he had been paroled on October 17, 1999, from his sentence for the 1990 burglary of Bembridge's home. Initially, Borunda denied knowing who the burglary victim was, but later he admitted that Bembridge testified against him at trial. Borunda was paroled to a halfway house about five blocks away from Bembridge's house. Borunda volunteered that he had been in prison for nine years, eight months, and two weeks for the Bembridge burglary.

Borunda said he had a bad back, and had reinjured his back on November 4; he showed the detectives he was wearing a weightlifter's belt for support. The detectives noticed some fresh scratch marks on Borunda's neck. Borunda explained he had had consensual rough sex recently, resulting in the scratch marks. The detectives also noticed an old neck injury. Borunda explained he had been stabbed by a gang member, and also had been shot. Both times, Borunda later tracked down his assailants and got

even with them. Borunda agreed with one detective's observation that he made sure he got even with anyone who did anything to him.

Borunda denied being in Bembridge's backyard anytime since the 1990 burglary. He admitted knowing the two men Mercado saw him speaking with in the park, but only by their shared first name. After initially claiming he had been in the park only a few times since his parole, Borunda admitted he frequented the park regularly, and admitted encountering Mercado. Borunda claimed his earlier denial of being in the park regularly was irrelevant.

Until this time, Borunda had been relaxed and calm. The detectives then said that, based on what he had told them, they suspected Borunda was involved in Bembridge's murder. Borunda became much more nervous and agitated, and denied murdering Bembridge, saying he was a burglar, not a murderer. Borunda refused the detectives' request to tape-record his statement.

Police searched Borunda's room at the halfway house. They discovered court records of Borunda's appeal from the 1990 burglary conviction, and a probation report regarding that case.

The only defense witness was a Department of Corrections psychiatric social worker who had treated Borunda from 1997-1999 for depression, obsessive-compulsive disorder, and substance abuse. She and Borunda discussed parole requirements, among other things. Borunda spoke of the 1990 burglary only once or twice, did not mention Bembridge's name, did not threaten the victim, and said he was sorry for the burglary. The social worker admitted that had Borunda threatened Bembridge, he probably would not have been paroled.

DISCUSSION

I

Borunda argues the evidence of his identity as Bembridge's murderer is insufficient as a matter of law. We disagree.

"The proper test for determining a claim of insufficiency of evidence in a criminal case is whether, on the entire record, a rational trier of fact could find the defendant guilty beyond a reasonable doubt. On appeal, we must view the evidence in the light most favorable to the People and must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.

"Although we must ensure the evidence is reasonable, credible, and of solid value, nonetheless it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts on which that determination depends. Thus, if the verdict is supported by substantial evidence, we must accord due deference to the trier of fact and not substitute our evaluation of a witness's credibility for that of the fact finder." (*People* v. *Ochoa* (1993) 6 Cal.4th 1199, 1206, internal quotations and citations omitted.)

"When undertaking such review, our opinion that the evidence could reasonably be reconciled with a finding of innocence or a lesser degree of crime does not warrant a reversal of the judgment. [Citation.]" (*People* v. *Hill* (1998) 17 Cal.4th 800, 849.)

"The uncorroborated testimony of a single witness is sufficient to sustain a conviction, unless the testimony is physically impossible or inherently improbable." (*People* v. *Scott* (1978) 21 Cal.3d 284, 296.) "The testimony of a single witness is sufficient to uphold a judgment even if it is contradicted by other evidence, inconsistent or false as to other portions. [Citations.]" (*In re Frederick G.* (1979) 96 Cal.App.3d 353, 366.)

"When [courts] decide issues of sufficiency of evidence, comparison with other cases is of limited utility, since each case necessarily depends on its own facts. [Citations.]" (*People v. Thomas* (1992) 2 Cal.4th 489, 516.)

As the parties acknowledge, the case against Borunda is circumstantial. While the evidence against Borunda may not be overwhelming, substantial evidence supports the jury's finding that he murdered Bembridge. First, there was strong evidence that Borunda had a powerful motive, revenge against Bembridge for her crucial role in his

lengthy imprisonment for burglarizing her home in 1990. He told the detectives how Bembridge testified against him. Borunda knew the exact number of years, months, and weeks he had been imprisoned. He kept documents from his appeal of the Bembridge burglary conviction, and a probation report about that case. He admitted being someone who exacted revenge against those he perceived as having wronged him. Once paroled, he frequented the portion of Drake Park adjoining Bembridge's house.

Second, the motive evidence is reinforced by Borunda's obsessive-compulsive disorder diagnosis, which a jury reasonably could infer would make him even more likely to ruminate on his imagined injuries inflicted by Bembridge, and eventually retaliate.

Third, Borunda lived within a few blocks of Bembridge's home, was unemployed, and spent long hours at the park adjoining Bembridge's backyard. Mercado saw him at the park near Bembridge's backyard several times before the murder, on the day of the murder, and several times after the murder. Borunda was arrested the day Mercado saw Borunda climb back over the fence from inside Bembridge's yard into the park, carrying a paper bag similar to that later found in his jacket which contained Bembridge's unique Scottish kilt pin. No one else ever was seen inside Bembridge's fence or house after her murder. After Borunda climbed back into the park, he spoke with Johnson and Vasquez and motioned them toward Bembridge's empty home. When the police approached, Johnson and Vasquez tried to elude them. A reasonable jury could conclude from this evidence that Borunda murdered Bembridge, returned, stole Bembridge's pin, and arranged for Johnson and Vasquez to continue a larger-scale burglary of her home.

Fourth, Borunda admitted hurting his back on November 4, the day after the murder. Although Bembridge only weighed 130 pounds, the evidence suggested her killer threw her body into the center of the overgrown underbrush in her backyard to hide her body. Even a strong man, particularly like Borunda with his admitted chronic back problems, could injure his back while doing so. A reasonable jury could infer that

Borunda injured his back while throwing Bembridge's body into the underbrush, particularly when combined with the other evidence.

Finally, Borunda was evasive and dishonest in his police interview, repeatedly claiming facts, such as being in the park only three times, or not knowing Bembridge was the person responsible for his 1990 burglary conviction, he later admitted were incorrect. He also suddenly became nervous when the topic switched from trespassing/burglary to murder.

We stress that, as we must, we look at the totality of the evidence in the light most favorable to the verdict. We reject Borunda's argument that each of these facts has a possible innocent explanation. None of Borunda's innocent explanations account for all the evidence of guilt, and none are as persuasive as that pointing to guilt. Moreover, our review need not eliminate innocent alternative evidentiary explanations; we must determine only that the guilty explanation is reasonable. We also reject Borunda's reliance on cases holding that, where the record contains some but not all of the evidence present here, such isolated pieces of evidence, alone, cannot support a conviction. None of those cases contain as much circumstantial evidence of guilt as does this case.

We also reject Borunda's argument that his acquittal of first-degree murder shows the jury rejected the prosecution's premeditation theory, undermining some of the conclusions discussed above. A jury's decision to convict on a lesser degree of a crime is as likely to reflect lenity or a compromise verdict as a rejection of some of the evidence. (*People v. Pahl* (1991) 226 Cal.App.3d 1651, 1656-1657.)

The totality of this evidence supports the jury's second-degree murder verdict.

II

In his unsuccessful pretrial motion to set aside the information based on alleged insufficient evidence (§ 995), Borunda referred to some preliminary hearing evidence he alleged showed others may have murdered Bembridge. That evidence, primarily related as hearsay by a detective, was: 1) a neighbor saw two apparent Hispanic gang members

jumping over Bembridge's backyard fence at some unspecified time before her murder; 2) Bembridge's friends reported she often kept one of her doors unlocked; 3) vagrants who frequented Drake Park thought Bembridge owned antiques and her house was an easy target; 4) sometime around November 3 or 4, a car containing two Black men was seen driving into Bembridge's driveway, and the police took partial tire molds left in a driveway pothole; and 5) during the police interview on November 18 of Johnson and Vasquez, the two men with whom Borunda spoke after jumping back over the fence from Bembridge's backyard into the park, Johnson said he knew Bembridge was old and assumed she owned antiques, while Vasquez, a gang member who had been to state prison, began crying while denying participation in the murder.

Later, the prosecution successfully moved to exclude this evidence as inadmissible third-party culpability evidence, and as more prejudicial than probative under Evidence Code section 352. The trial court agreed with the prosecutor's statement that "there has to be direct physical link" for such evidence to be admitted. The trial court found the evidence insufficient to warrant its admissibility, noting that only the evidence of the car in the driveway on November 3 or 4 related to proximity to the house at the time of the murder, the rest related to events before or after, and all the evidence was insufficiently reliable to be admitted.

Borunda contends the trial court erred in excluding this evidence. Borunda argues the evidence should have been admitted because it was sufficient to raise a reasonable doubt whether he killed Bembridge. The contention lacks merit.

"To be admissible, the third-party evidence need not show 'substantial proof of a probability' that the third person committed the act; it need only be capable of raising a reasonable doubt of defendant's guilt. At the same time, we do not require that any evidence, however remote, must be admitted to show a third party's possible culpability. . . . [E]vidence of mere motive or opportunity to commit the crime in another person, without more, will not suffice to raise a reasonable doubt about a defendant's guilt: *there must be direct or circumstantial evidence linking the third*

person to the actual perpetration of the crime." (Italics added.) (*People v. Hall* (1986) 41 Cal.3d 826, 833; accord, *People v. Davis* (1995) 10 Cal.4th 463, 500-501.)

"[C]ourts should simply treat third-party culpability evidence like any other evidence: if relevant it is admissible ([Evid. Code]§ 350) unless its probative value is substantially outweighed by the risk of undue delay, prejudice, or confusion ([Evid. Code] § 352)." (*People v. Hall*, *supra*, 41 Cal.3d at p. 834.) Courts should be cautious in conducting the balancing necessary for such rulings, not substituting their own credibility findings for required case-by-case analysis. (*Ibid*; *People v. Von Villas* (1992) 10 Cal.App.4th 201, 264-265.)

Only relevant evidence is admissible at trial. (Evid. Code, § 350.) Relevant evidence is that which has "any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (*Id*., § 210.) The trial court must determine the relevance and admissibility of evidence before it can be admitted. (*Id*., §§ 400, 402.) We review the trial court's relevance admissibility decisions for abuse of discretion. (*People v. Waidla* (2000) 22 Cal.4th 690, 717.)

"The court in its discretion may exclude evidence if its probative value is *substantially* outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create *substantial* danger of undue prejudice, or confusing the issues, or of misleading the jury." (Evid. Code, § 352, italics added.) We review the trial court's decision to exclude evidence under Evidence Code section 352 for abuse of discretion. (*People v. Jackson* (1996) 13 Cal.4th 1164, 1216.)

The trial court properly exercised its discretion. First, we reject Borunda's claim, relying on the prosecutor's statement quoted above, that the trial court applied the wrong standard. Although the court did agree with the prosecutor's comment, in denying the request to admit the evidence of the two men who drove onto the property, the court noted, "it does not meet the standard of evidence linking a third party either directly or circumstantially to the crime." The trial court's extended explanation of its

ruling demonstrates the trial court properly analyzed the evidence and applied the correct test.

Second, with the exception of the brief observation of a car in Bembridge's driveway sometime near the day of the murder, all of the other evidence involved occurrences long before or long after the murder. None of the evidence put anyone other than the two Hispanic gang members inside Bembridge's house or yard at anytime. That yard entry happened some unspecified time before the murder. Regarding the two Black men seen in the car in the driveway on November 3 or November 4, the view was brief, and there is no evidence the men stayed longer than a few moments. Rumors that Bembridge had antiques, a fact produced at trial, added nothing to the speculative nature of the evidence, suggesting nothing more than others may have had motive to burglarize the home. Finally, Vasquez' tears when he denied the murder likewise adds nothing to this record. None of this evidence placed anyone other than Borunda in Bembridge's house or yard at the time of the murder. At most, the evidence showed only that others had the opportunity to trespass on Bembridge's property at times other than when the murder occurred, and may have thought about burglarizing her home. The trial court properly excluded the evidence.

III

Borunda's trial counsel did not object to the court's endorsement of the prosecutor's statement quoted in section II, did not file written points and authorities opposing the prosecution's written motion to exclude the third-party culpability evidence, and did not argue the evidence provided an alternative explanation of how he acquired Bembridge's Scottish kilt pin. Based on these omissions, Borunda contends his lawyer was incompetent. We disagree.

"[T]he burden of proving a claim of inadequate trial assistance is on the appellant. [Citation.] Thus, appellant must show that trial counsel . . . failed to act in a manner to be expected of reasonably competent attorneys acting as diligent advocates. In addition, appellant must establish that counsel's acts or omissions

resulted in the withdrawal of a potentially meritorious defense." (*People* v. *Pope* (1979) 23 Cal.3d 412, 425.) "'It is established that reversal for ineffective assistance of counsel is generally unwarranted unless *the defendant* shows counsel's alleged failings *prejudiced* his defense. (*Strickland* v. *Washington* (1984) 466 U.S. 668, 693-694 . . . ; *People* v. *Pope*[, *supra*,] 23 Cal.3d [at p.] 425 . . . ; [citation].)' [Citation.]" (*People* v. *Wright* (1990) 52 Cal.3d 367, 404.)

"A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction . . . has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." (*Strickland* v. *Washington* (1984) 466 U.S. 668, 687.) "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Id*. at p. 694.)

If trial counsel makes a reasonable tactical choice based on the information available to him at the time to forego presenting specific evidence, asking certain questions, or making specific arguments, that choice cannot be second-guessed later because, with the advantage of hindsight, another choice might have been better. (See *People v. Samayoa* (1997) 15 Cal.4th 795, 857.)

Moreover, where the record is silent regarding why trial counsel failed to act as demanded on appeal, "unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation, the claim must be rejected on appeal." (*People v. Mendoza-Tello* (1997) 15 Cal.4th 264, 266.)

We already have rejected the claim that the trial court erred in endorsing the quoted statement or excluding the proffered evidence. Thus, Borunda's counsel did not commit misconduct by failing to object or file a written opposition.

Moreover, the evidence of other people having access to Bembridge's home was no more admissible to show an innocent explanation of Borunda's possession of Bembridge's kilt pin. It was simply another facet of arguing that the third-party culpability evidence should have been admitted.

Finally, counsel was not asked for any explanation of his conduct, which, in any event, was not incompetent.

DISPOSITION

We affirm the judgment.

NOT TO BE PUBLISHED.

SUZUKAWA, J.*

We concur:

MALLANO, Acting P.J.

VOGEL, J.

---

* (Judge of the L. A. Sup. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.)